

SAAD (Migration) [2018] AATA 991 (20 March 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs SIMONA SAAD
CASE NUMBER:	1620406
DIBP REFERENCE(S):	BCC2016/2615585
MEMBER:	Hugh Sanderson
DATE:	20 March 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations.

Statement made on 20 March 2018 at 1:29pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) visa – Requirement to hold substantive visa at time of application – Applicant did not hold substantive visa – Whether Schedule 3 criteria should be waived – Whether “compelling reasons” exist – Applicant has medical condition – Medical condition likely to worsen if made to return to home country

LEGISLATION

Migration Act 1958, s 65

Migration Regulations 1994, Schedule 2, cls 820.211(2)(a), 820.211(2)(d)(ii), Schedule 3, Criterion 3001

CASES

Babicci v MIMIA (2005) 141 FCR 285

MZYPZ v MIAC [2012] FCA 478

Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 16 November 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 8 August 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(d)(ii) because the delegate found the applicant did not hold a substantive visa at the time of the application and did not meet the Schedule 3 criteria. Further, the delegate was not satisfied that there were compelling reasons for not applying those criteria.

BACKGROUND

4. The applicant is a citizen of Lebanon and is currently 29 years old. Her parents and four siblings continue to live in Lebanon. She first entered Australia in October 2011 holding a subclass 573 Student visa. She was granted further Student visas in Australia. The last visa she held in Australia expired on 15 March 2016. She has not held a substantive visa since that date. She applied for a subclass 485 Temporary Graduate visa on 28 February 2016, however, that application was refused by the Department on 13 July 2016.
5. The sponsor of the applicant is Roland Desamito. He was born in the Philippines and is currently 32 years old. He was granted a subclass 189 Skilled Independent visa on 22 January 2015 and now has the right to reside permanently in Australia.
6. The parties claimed that they first met each other on 28 November 2013 at a staff Christmas party. They worked for the same organisation although in different locations. A relationship developed between them after that time. In November 2014 the applicant was transferred to the shop the sponsor normally worked. They claimed that they started living together in September 2015 and the sponsor proposed marriage to the applicant on 20 January 2016. They were married on 28 July 2016.
7. The applicant provided various documents to establish the parties were in a genuine relationship. She provided statements where she set out what she believed were compelling reasons for not applying the Schedule 3 criteria. This included the following:
 - Her application for the 485 Temporary Graduate visa was refused because she was not aware she was required to provide a Skills Assessment to the Department;
 - There was miscommunication between herself and the Department which led to the refusal of that visa application;
 - The applicant was distracted at that time because she was planning her wedding to the sponsor;
 - The applicant and the sponsor are in a genuine relationship and she could not imagine herself being far away from him;

- The parties planned to travel to Lebanon to conduct a wedding ceremony there with her family;
 - The applicant and the sponsor planned to have children together and go travelling overseas; and
 - The parties are devoted to each other and they have never been separated since they moved in to live together.
8. The sponsor travelled overseas from 4 November 2016 to 20 November 2016, returning to the Philippines.
9. The delegate who considered the application noted the following issues:
- The parties had only been living together since September 2015 and the relationship was not long standing;
 - The fact that the parties may be in a genuine relationship does not, of itself, provide a compelling reason for not applying the Schedule 3 criteria;
 - Failing to meet the requirements of an alternative visa application when the applicant had the opportunity to engage a migration agent or use an interpreting service does not provide a compelling reason; and
 - There is no information that any emotional hardship caused by any separation would be such that it would be considered a compelling reason.
10. Taking these matters into account, the delegate was not satisfied that there were compelling reasons for not applying the Schedule 3 criteria. Accordingly, the delegate found the applicant did not meet the criteria in cl.820.211(2)(d)(ii) and refused the application.

INFORMATION TO THE TRIBUNAL

11. The applicant provided further documents to the Tribunal including letters from Shire Total Healthcare in respect of her treatment for type II diabetes. Numerous photos were provided of the parties together at various social events and cards sent to each other.
12. The applicant appeared before the Tribunal on 20 March 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and Carolien Koreneff, clinical nurse and diabetes specialist who had been treating the applicant.
13. The applicant and sponsor gave consistent information as to various aspects of their relationship together. They gave consistent information as to the applicant's diagnosis of diabetes and the difficulties they have encountered as a result of this diagnosis. They gave consistent information about their plans to have a child together and the concerns of doing so as a result of the applicant's diabetes. They gave consistent information about the level of dependence they have on each other, particularly the applicant upon the sponsor and the stress she experiences when they are separated.
14. Ms Koreneff gave evidence about the treatment of the applicant for diabetes. She said that she was aware the applicant and sponsor were hoping to have a child together, but unless the diabetes is under 'excellent control' there is a significant risk to both the mother and the child during any pregnancy. She said the applicant's diabetes had improved significantly and she would class the applicant's diabetes as currently under 'very good control'. She said that as a person gets older the control of the diabetes generally deteriorates and it becomes less

likely that the applicant would be in a position where it would be safe for her to fall pregnant. Any delay in pregnancy would therefore significantly increase the risk factors to both the mother and the child.

15. Ms Koreneff said that she believed the level of treatment for diabetes would be reduced in Lebanon. She said that her experience with patients who had returned to Lebanon was that their control of diabetes had reduced when she tested them upon their return to Australia. She said that this was due to a number of factors. She said that she did not believe that the facilities and treatment that was available to the applicant in Australia for her treatment of diabetes would be available in Lebanon.
16. Ms Koreneff gave evidence as to the support the sponsor gave to the applicant in respect of her treatment of diabetes. She said that the sponsor provided the applicant a high degree of support and assistance in reducing stress for the applicant which, in turn, assisted her control of her diabetes. She believed that if the applicant were separated from the sponsor for an extended period of time that this would have a detrimental effect on the control of the applicant's diabetes and her health.
17. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. The issue in the present case is whether the applicant meets the Schedule 3 criteria and, if she does not, if there are compelling reasons for not applying those criteria.

DOES THE APPLICANT MEET SCHEDULE 3 CRITERIA, OR SHOULD THOSE CRITERIA BE WAIVED?

19. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
20. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria.

CRITERION 3001

21. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2). In the circumstances of the applicant, the relevant day is the last day when the applicant held a substantive.
22. The applicant's last substantive visa expired on 15 March 2016. This is more than four months prior to the filing of the Partner visa application.
23. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

COMPELLING REASONS

24. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
25. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Bab Ricci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
26. The applicant's last substantive visa was a student visa which ceased on 15 March 2016. The application for a subclass 485 visa was refused by the Department. Although the applicant complained that there was miscommunication with herself and the Department which led to the refusal of that visa application, there is nothing to indicate that the decision made by the Department was incorrect. The applicant had the opportunity to seek a review of that decision but did not do so.
27. The Tribunal is not satisfied that the reasons the applicant did not hold a substantive visa at the time she filed the Partner visa application provides a compelling reason for not applying the Schedule 3 criteria.
28. The Tribunal has not made any critical assessment of whether, at the time of the application or at the time of this decision, the parties were in and continued to be in a genuine, continuing and exclusive relationship. The applicant provided to the Tribunal various documents to support the claim that they were in a genuine relationship. This included photos of the parties together and correspondence between themselves. The parties presented as being in a genuine relationship when they appeared before the Tribunal. The evidence from the diabetes nurse treating the applicant indicated that the sponsor gave her a high degree of emotional support which would be expected in a genuine relationship. The Tribunal has accepted, for the purpose of this decision, that the parties are in a genuine and continuing relationship.
29. The criteria in cl.820.211(2)(a) is that the applicant is the spouse or de facto partner of the sponsoring partner. This, in part, requires the applicant and the sponsor to be in a genuine, continuing and exclusive relationship. If an applicant does not hold a substantive visa and does not meet the Schedule 3 criteria, the requirement in cl.820.211(2)(d)(ii) to provide compelling reasons for not applying those criteria is in addition to the criteria in cl.820.211(2)(a). If the relationship itself can be considered a compelling reason for not applying the Schedule 3 criteria, it must be the particular aspects of the relationship which must provide a compelling reason for not applying the Schedule 3 criteria and not simply the fact that the parties are in a relationship. The Tribunal has considered all the aspects of the relationship, including the fact that the parties claim to be in a relationship, the length of the relationship, the nature and the extent of the bonds between the parties, and the consequences of any separation, even if only for a limited time while an offshore application is being processed, when considering if there are compelling reasons for not applying the Schedule 3 criteria.
30. The most significant factor put by the applicant when considering whether there are compelling reasons for not applying the Schedule 3 criteria is the fact that the applicant suffers from diabetes and the effect on her should the Schedule 3 criteria and not be waived and she be required to file an offshore Partner visa application.

31. The Tribunal has considered the information provided by the applicant as to her diabetes, including how her diabetes affects her life, the issues that exacerbate her conditions including stress, and the dependence she has upon the sponsor in helping her to maintain appropriate blood-glucose levels. The Tribunal takes into account the fact that she and the sponsor wish to have a child together and the need to control her diabetes to greater level if she is to be able to fall pregnant without increasing the risk factors both to herself and her child. The Tribunal has taken into account the evidence of Ms Koreneff which it found very persuasive. The risk factors to the applicant as she gets older are likely to increase. She is not likely to be able to access to the same level of treatment and medication in Lebanon. She was concerned that the applicant's blood-glucose level would likely increase if she did return to Lebanon this would cause further difficulties for any plans they have for her to have a child in the future.
32. The Tribunal is satisfied that the particular circumstances of the applicant respect of her diabetes provide a compelling reason for not applying the Schedule 3 criteria. The Tribunal accepts that the applicant has a special dependence upon the sponsor for the control of the diabetes and that it is likely that her diabetes will deteriorate if she is required to return to Lebanon to file any offshore Partner visa application. It is likely any return to Lebanon will delay any likelihood that the applicant would be able to fall pregnant and thus increase the risk factors for herself and her child if she does fall pregnant. Although finely balanced, the Tribunal finds the overall circumstances of the applicant as set out above provide a compelling reason for not applying the Schedule 3 criteria.
33. For the above reasons the Tribunal is satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant meets cl.820.211(2)(d)(ii).
34. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

35. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations.

Hugh Sanderson
Member